

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Choice of Law for Cross Border Road Traffic Accidents

NOTE



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

**Choice of Law for Cross Border Road
Traffic Accidents**

NOTE

This document was requested by the European Parliament's Committee on Legal Affairs.

AUTHOR

Jenny PAPETTAS
Birmingham Law School
Edgbaston
Birmingham
B15 2TT
UK

RESPONSIBLE ADMINISTRATOR

Vesna NAGLIČ
Policy Department C: Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: vesna.naglic@europarl.europa.eu

LINGUISTIC VERSIONS

Original: EN

ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its monthly newsletter please write to:
poldep-citizens@europarl.europa.eu

European Parliament, manuscript completed in November 2012.

© European Union, 2012.

This document is available on the Internet at:

<http://www.europarl.europa.eu/studies>

DISCLAIMER

The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the publisher is given prior notice and sent a copy.

CONTENTS

EXECUTIVE SUMMARY	4
INTRODUCTION.....	6
1. ROME II AND THE MOTOR INSURANCE DIRECTIVE	7
1.1. The Applicable law under Rome II	7
1.2. The Motor Insurance Directive	8
1.3. Different Choice of Law Outcomes and Their Reconciliation	11
2. ROME II AND THE HAGUE CONVENTION	15
2.1. The Rules of the Hague Convention	15
2.2. Article 28 Rome II: The Relationship between Rome II and the Hague Convention.	17
3. THE HAGUE CONVENTION AND THE MID.....	20
4. POSSIBLE AMENDMENT	21

EXECUTIVE SUMMARY

A cross border road traffic accident occurring within the EU has the potential to attract the application of three legal regimes, all of which contain choice of law rules. The regimes are contained in Rome II Regulation, the Hague Convention on the Law Applicable to Traffic Accidents and the Motor Insurance Directive (MID).

The MID has relevance in this area of law since the majority of claims arising out of traffic accidents are met by insurers rather than the wrongdoer himself. Within EU insurers must act in accordance with the rules set out in the MID. One such rule is that insurance coverage should be provided in accordance with the law of the place of the accident or the law of the place where the vehicle is normally based, whichever provides for the highest cover. If providing cover relates not only to the maximum amount the policy will pay out, but also to the type and quantification of damage, this would further the aim of the Directive of protecting the interests of victims, but this could also conflict with the rules in Rome II.

The application of Rome II will likely lead to the application of the law of the place of the accident or the law of shared habitual residence between the parties to the action. Exceptionally it may lead to the application of another law. The application of a law other than that of the victim's residence has been shown to hold the potential for the over/under compensation of a victim and also to provide an advantage or disadvantage in terms of periods of limitation or prescription. However, these rules may be subject to the choice of law rule in the MID. It is arguable that the rule in the MID could be considered to be an overriding, mandatory rule for the purposes of Art 16 of Rome II or as a provision of Community law, laying down a choice of law rule in relation to a particular matter for the purposes of Art 27 of Rome II.

Although it is possible to make sense of the relationship between the two instruments in this way, it also means that the applicable law is prone to fragmentation so that one law might apply to questions of liability and limitation, whilst another applies to questions of type and quantification of damage. This might result in undesirable consequences which could lead to an unwarranted exacerbation of the over/under compensation of a victim.

Rome II permits the continued application of the Hague Convention by those Member States (MS) who were signatories to it when Rome II entered into force. The rules in the two instruments can provide differing choice of law outcomes, guided by different aims and objectives. The Convention will designate the law of the place of the accident, or the law of the place of registration of the vehicle as applicable.

The exact relationship between Rome II and the Hague Convention is yet to be made clear. For example, Art 1 of Rome II and Art 1 of the Hague Convention both convey the scope of the respective instruments and both refer to liability for non-contractual obligations. It is arguable that the interpretation of the phrase in Art 1 of the Convention will be affected as regards its application between EU MS so that it reflects the autonomous and mutually exclusive definitions of the terms contractual and non-contractual obligations used in the Rome I and Rome II Regulations. This point is not entirely free from doubt. Furthermore, it is unclear whether those agreements as to choice of law which are permitted under Rome II will be allowed under the Convention.

Even if the points of uncertainty concerning the relationship between Rome II and the Hague Convention are resolved, the situation is likely to remain complex and will also be one in which forum shopping is encouraged by the possibility of different outcomes, depending on which forum is seized of the case. This does not assist those seeking to settle claims outside of the litigation process, since it will not be possible to say with absolute certainty which law should be used for that purpose.

With regard to the Hague Convention and the MID, it seems fairly straightforward that the Convention cannot be allowed to prejudice the application of the Directive. The EU itself is not bound by the Convention and less than half of the EU MS are signatories to it. To permit the Convention to affect the operation of EU law would result in the uneven

application of that law amongst the MS, which would contravene the basic principle of uniformity. However, the application of the Directive again gives rise to the potential for the fragmentation of the applicable law, in the same way as under Rome II.

The current situation is unsatisfactory. It is complex and incoherent and many uncertainties persist. The majority of claims arising out of traffic accidents are settled outside of the litigation process between victims and insurers directly. The rules of the MID favour the victim in this situation. They recognise the victim's weaker position in the relationship and create a system where the claim can be made from the victim's home state and in their native language. Those justifications do not apply as between the victim and the wrongdoer, where the parties are on an equal footing. But, in respect of a direct action against an insurer, a framework is already in place which could be built upon to address the remaining difficulties faced by victims.

A number of options have already been put forward for the remedy of the current situation. Harmonisation of substantive laws relating to damages and limitation periods would resolve the current issues surrounding applicable law. However, whilst there might be a remote possibility of agreement regarding limitation periods in the not too distant future, it is submitted that harmonisation of the law relating to damages is an unrealistic goal in the short to medium term. Agreement here is likely to remain elusive for the foreseeable future. The Provision of information as regards limitation periods would not address the complexity of the choice of law rules in this area and would be unlikely, in the author's opinion, to have enough impact to remedy the current prejudice faced by victims.

There is no perfect solution to the issues in this area. This note recommends a choice of law solution, whereby the victim's home law should apply to claims brought directly against an insurer and which have been brought in accordance with the MID. This solution would be in support of both the free movement of persons across borders within the EU and of Commission action to strengthen victims' rights. However, a policy choice would have to be made between applying that law in full and exposing the driver's conduct to rules on liability of a state in which he was not acting at the time of the accident, or splitting the law so that liability would be governed by the law of the place of the accident whilst all other aspects of the claim would be governed by the law of the victim's state of habitual residence. As stated above, splitting the applicable law in this way could be criticised for producing incoherent outcomes which can exacerbate the over or under compensation of a victim.

For this reason and since insurers are already exposed to the laws in each MS as a result of the rules contained in the MID and Rome II and/or the Hague Convention, it is submitted that justification can be found for applying the law of the victim's state of habitual residence in full with the caveat that the claimant be made to choose between bringing an action against the insurer or bringing an action against the wrongdoer so as to prevent issues in respect of related actions.

INTRODUCTION

A natural consequence of increased cross border road travel is a greater incidence of traffic accidents where at least one of the parties is not usually resident in the country where the accident takes place.¹ When such accidents occur it is necessary to determine which law will apply to the settlement of any claims arising from those incidents. For accidents occurring on or after 11th January 2009² Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) will apply. The Regulation seeks to provide uniform rules on the determination of the applicable law for application in all the courts of the Member States other than Denmark.³

However, Rome II, through Article 28, also permits Member States who were already signatories to the Hague Convention on the Law Applicable to Traffic Accidents,⁴ to continue to apply this instrument if they wish to do so. All twelve Member States who are signatories to that Convention indicated their intention to continue to apply it.⁵

It becomes immediately apparent that uniformity in applicable law rules is undermined by this approach. Furthermore, the exact nature of the relationship between Rome II and the Hague Convention must be made explicit. But any complexity which is created by the simultaneous application of two choice of law regimes in respect of traffic accidents is further compounded by the practical realities of traffic accident litigation, where an insurer is nearly always involved.

Research has confirmed that it is insurers who make the payment of compensation in the vast majority of claims arising out of road traffic accidents.⁶ Within the EU the Motor Insurance Directive⁷ provides for a compulsory scheme of third party motor insurance in all Member States. The Directive regulates the provision of such insurance coverage and provides a framework for the settlement of claims. The scheme of the Directive aims to further the objective of ensuring the free movement of persons throughout the Union by guaranteeing that compensation will be available regardless of where in the Union the accident occurs. Included in the rules of the MID are some provisions which it is possible to read as choice of law rules.

As such, with regard to applicable law for cross border traffic accidents within the EU, what was a somewhat obscure and potentially complex relationship between two choice of law instruments, in reality becomes a tangle of three regimes; a tripartite relationship which needs to be elucidated.

Bearing in mind its limited length, this note seeks to identify some key areas of overlap between the three legal instruments before attempting to determine which instrument should or will prevail. What is revealed, however, is a very uncertain, complex and incoherent picture which would benefit from prompt amendment.

¹ For interesting statistics on cross border travel and accidents see: "Public Consultation on Limitation Periods for Compensation Claims of Victims of Cross Border Road Traffic Accidents in the EU" Consultation Document available at http://ec.europa.eu/justice/newsroom/civil/opinion/121031_en.htm and "Compensation of victims of cross-border road traffic accidents in the EU: Assessment of selected options", study by the EP, March 2007, p 15.

² As decided C-412/10, *Homawoo v. GMF Assurances SA*, ECR [2011] 00000.

³ See Art 1(4) of Rome II.

⁴ 4th May 1971.

⁵ Under Art 29 of Rome II Member States were required to notify the Commission of any Conventions they intended to continue to apply alongside the Regulation. A list of such Conventions was duly published by the Commission in the Official Journal, C343/7, 17.12.10.

⁶ See "Compensation of victims of cross-border road traffic accidents in the EU: comparison of national practices, analysis of problems and evaluation of options for improving the position of cross-border victims", report prepared by law firm Demolin Brulard Barthélémy for the European Commission and available at: http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/juri_oj_2008_3004_etude_romei#i_JUR_I_OJ20083004etuderomeIIen.pdf, p44.

⁷ Directive 2009/103/EC [2009] OJ L263/11

1. ROME II AND THE MOTOR INSURANCE DIRECTIVE⁸

1.1. The Applicable law under Rome II

Rome II does not contain a rule specific to traffic accidents.⁹ If Rome II is to determine applicable law, it is the general rules of the Regulation which will do so.

1.1.1. Rome II Article 4 – The General Rule

Article 4 is relatively straight forward for traffic accident cases. It provides under Art 4(1) that the applicable law will be that of the place where the direct damage occurred. Thus it is not to be determined on the basis of any indirect damage which might arise. This is reinforced by Recital 17. Article 4 (1) will in most cases, therefore, designate the law of the place of the accident, this being the place where the direct damage occurs. This outcome is thought to provide an appropriate balance between the interests of the parties and to be capable of uniform application whilst providing predictability. These are important aims of Rome II as set out in Recitals 6 and 16.

The rule in Art 4(1) is rigid; it is not capable of taking into account circumstances in which it would not be just to apply the *lex loci damni* because, for example, another law is much more closely connected to the particular circumstances. This is felt to always be the case where the person who has suffered damage and the party who is said to be liable share a common habitual residence. As such Art 4(2) provides an exception to Art 4(1) so that where the parties share habitual residence the law of that state will apply.

A further exception to both of the rules in Art 4(1) and 4(2) is contained in Art 4(3). This rule provides that where it is clear, from all the circumstances, that the tort is manifestly more closely connected to a country other than that provided for under Art 4(1) or 4(2), the law of that country shall apply. Use of the word '*manifestly*' in the Article indicates that there is a high threshold of close connectivity which must be met before the exception will be triggered.¹⁰

1.1.2. Rome II - Article 14

Article 14 of Rome II permits the parties, in some circumstances, to choose the law that should determine the issues between them. It permits non-commercial parties to conclude *ex post* agreements, whereas agreements between parties who are pursuing commercial activities may also make *ex ante* agreements. *Ex ante* agreements are likely to be a rare occurrence in respect of traffic accidents since such incidents are more likely to occur between parties who are previously unknown to each other. Any *ex post* agreement must not prejudice the rights of third parties.¹¹ Furthermore, any agreement pertaining to an accident, where all the relevant elements are located in one or more of the Member States, must not prejudice the application of any Community provision which cannot be derogated from by agreement.¹²

⁸ For detailed consideration of this relationship see J Papettas, 'Direct Actions Against Insurers of Intra Community Cross Border Traffic Accidents: Rome II and the Motor Insurance Directives' (2012) 8 Journal of Private International Law 297.

⁹ An attempt by the European Parliament to insert a traffic accident specific rule during the legislative process of Rome II was unsuccessful. See the Report on the proposal for a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II"), 27.6.2005, A6-0211/2005 FINAL.

¹⁰ The Commission, in its original proposal for Rome II was clear that the application of Art 4(3) should remain exceptional. See COM (2003) 427 FINAL, 12.

¹¹ Article 14(1).

¹² Article 14(3).

1.1.3. Rome II - Article 18

Article 18 provides that any person suffering damage may bring their claim directly against the insurer of the person claimed to be liable if the law applicable to the tort (under the rules as discussed above) or the law of the insurance contract so provides. This is of particular relevance in traffic accident cases. In the EU third party liability insurance is compulsory for all vehicles registered and stationed in Member States, as is a right of direct action against that insurer.¹³ It can immediately be noted that it is open to victims of accidents occurring within the EU and caused by vehicles registered within the EU to bring an action for compensation directly against the insurer of a liable driver. Doing so will subject the claim to the rules of the MID.

1.1.4. Other Relevant Provisions of Rome II

Article 15 of Rome II provides a non-exhaustive list of issues to which the applicable law will apply. It determines the scope of the applicable law. Article 15 makes clear that the designated law will determine, amongst other things, the basis and extent of liability, the grounds for exemption from liability, the existence and assessment of damages, who is entitled to compensation, liability for the acts of another person and the rules on limitation and prescription. Although type and amount of compensation is mentioned here, Recital 33 provides:

According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention.

It is as yet unclear how Recital 33 will be utilised in practice. Although the provision has the potential to impact upon the manner in which compensation may be calculated, as yet there are no reported cases in which its effect has been considered. It is an express instruction to the courts of the Member States, although as a Recital it does not carry the weight of a legal rule. Furthermore, it is unclear, in the majority of claims which are settled without the need for recourse to court proceedings, what if any regard will be paid to this provision.

1.2. The Motor Insurance Directive

The Motor Insurance Directive is a measure which consolidates the rules of five previous Motor Insurance Directives¹⁴ into one instrument. The Directives, over a period of 30 or so years, progressively developed a harmonised scheme of compulsory third party insurance, covering all of the Member States. The MID represents a social policy seeking to minimise the impact, on victims, of the large volumes of loss and injury that occur in the EU as a result of road traffic accidents.¹⁵

It is possible to identify two underlying objectives of the Directive. The first is the promotion of the internal market in insurance services through the establishment of a level playing field for motor insurers.¹⁶ The second is the free movement of persons, goods and vehicles throughout the EU by ensuring that insurance policies cover the whole territory of the union upon the payment of one premium and by ensuring

¹³ See Article 3 and 18 of the MID respectively.

¹⁴ Council Directives 72/166/EEC, 84/5/EEC, 90/232/EEC, 2000/26/EC and 2005/14/EC, colloquially known as the first MID, second MID and so on.

¹⁵ See C-518/06 *Commission v Italy* [2009] ECR I-3491, paras 52, 75 and 82 in particular.

¹⁶ Directive 2009/103/EC, Recital 2.

protection of accident victims' interests regardless of where in the EU the accident occurs.¹⁷ Where these aims come into conflict it is the protection of victims which has been seen to prevail in the jurisprudence of the CJEU.¹⁸

1.2.1. Scope of the Directive

The Directive provides that each Member State shall ensure that civil liability in respect of vehicles normally based its territory is covered by insurance.¹⁹ Such insurance must cover loss in the territory of any of the other Member States, in accordance with the law of those states.²⁰ The effect of the Directive thus extends throughout the Union. It is important to note however, that the Directive is concerned only with the provision of insurance coverage; it leaves it to individual Member States to decide on rules relating to liability.²¹ This has been confirmed recently in the case of *José Maria Ambrósio Lavrador, Maria Cândida Olival Ferreira Bonifácio v Companhia de Seguros Fidelidade- Mundial SA*.²²

1.2.2. The Provisions of the Directive

The basic premise of the Directive is that all vehicles based in the territory of a Member State (usually determined in accordance with the registration plate the vehicle bears) should have insurance cover in respect of the third party losses which might be caused by the operation of such vehicles. Minimum coverage amounts are set by the Directive and a process for the periodic reviewed of those amounts is established.²³ The jurisprudence of the CJEU confirms that all third party personal injury and property damage are to be covered in order to prevent any disparity in the treatment of victims and to make it irrelevant in this regard where the accident occurred within the Union.²⁴ The Directives provide that all passengers other than the driver are to be covered by the policy of insurance as are pedestrians, cyclists and other non-motorised users of the road.²⁵ Case law has shown that the policy of protecting victims is very strong so that even in cases where a passenger who is the usual driver, and who is the insured, allows another to drive the vehicle, knowing that they are drunk or uninsured, the ability of that person to claim as a passenger if they become a victim of a traffic accident as a result of permitting the driver to operate the vehicle is not affected.²⁶

To these basic provisions are added a number of measures specifically meant to address the problems faced by those persons who suffer loss whilst visiting a Member State which is not that of their habitual residence; otherwise known as visiting victims. In order to ensure the provision of compensation regardless of where in the Union the accident occurred, it was felt that special rules ought to mitigate the additional problems such a situation gives rise to. In particular dealing with a foreign insurer in a foreign language whilst attempting to gather the required information from foreign parties who are situated in a foreign state were all felt to make it much more difficult for visiting

¹⁷The objective of victim protection is a recurring theme in the recitals to the Directive but see in particular Recitals 2, 12, 20, 29, 31 and 47.

¹⁸ See C – 518/06 *Commission v. Italy* [2009] ECR I-3491.

¹⁹ Article 2.

²⁰ Article 3.

²¹ Ibid.

²² C-409/09, [2011] ECR 0000.

²³ Article 9.

²⁴ See the case of C-129/94 *Bernaldez* [1996] E.C.R. I-01829.

²⁵ Article 12. Also see *Vitor Manuel Mendes Ferreira and Maria Clara Delgado Correia Ferreira v Companhia de Seguros Mundial Confiança SA* C348/98 E.C.R. [2000] I-06711.

²⁶ See for example *Katja Candolin, Jari-Antero Viljaniemi and Veli-Matti Paananen v Vahinkovakuutusosakeyhtiö Pohjola and Jarno Ruokoranta* C-537/03 E.C.R.[2005] I-05745.

victims to obtain compensation.²⁷ Accordingly the Directive provides that all insurers operating within the Union must provide, in each Member State other than that where they have received their authorisation, a claims representative who is capable of settling claims on the insurer's behalf and who is able to examine cases in the language of the State where they are based.²⁸ A right of direct action against the insurer is established, along with the right to bring such an action in the courts of the state of domicile of the victim.²⁹ The Directive requires all Member States to establish an Information Centre responsible for keeping a register of all vehicles usually based in the territory of that State,³⁰ the insurers who provide cover for those vehicles and the names and addresses of all the claims representatives who represent each of those insurers in the other Member States. This information is to be made readily available to accident victims upon request.³¹

These measures constitute a framework which aims to make it as easy as possible for a visiting victim to seek compensation from an insurer following a traffic accident. In this way they can be viewed as victim protection measures.³²

Choice of law rules

In addition to all of the rules outlined above, the Directive provides, in Art 3, the following rule:

Each Member State shall take all appropriate measures to ensure that the contract of insurance also covers:

- a) according to the law in force in other Member States, any loss or injury which is caused in the territory of those states*

This is supplemented by Art 14 which provides that Member States should ensure that compulsory policies of motor insurance:

- b) guarantee, on the basis of [a] single premium, in each Member State, the cover required by its law or the cover required by the law of the Member State where the vehicle is normally based when that cover is higher.*

These rules stem from the first³³ and third³⁴ MIDs respectively. The MIDs have been progressive in building a harmonised scheme of compulsory third party insurance throughout the territory of the EU. The first MID was occupied with the task of producing conditions under which it became unnecessary for border checks on insurance within the EU. Art 3 (originally Art 3 of the first MID) seeks to ensure that policies covered the

²⁷ See the Commission proposal for the forth MID, COM (97) 510 Final, OJ C 343, 13.11.1997 at p2-3.

²⁸ Article 21.

²⁹ Article 18 establishes the right of direct action. Recital 32 relies on a particular interpretation of Art 9(1)(b) and 11(2) of the Brussels Regulation and provides that the claim may be brought in the state of domicile of the victim. This interpretation was confirmed by the CJEU in Case C- 463/06 *FBTO Schadeverzekeringen NV v. Odenbreit* [2007] ECR I-11321.

³⁰ Article 23.

³¹ Article 23(3).

³² There are further victim protection elements to the scheme created by the MID such as the provision of compensation in cases where there is no insurance or where insurers prove to be dilatory in settling claims by national compensation bodies. For lack of space these measures are not addressed here.

³³ See footnote 14 above.

³⁴ Ibid.

minimum required in each Member State that a vehicle might be travelling in. This renders border checks on insurance in the EU unnecessary and promotes the free movement of persons and vehicles.³⁵ It also has the consequential effect that passengers and other victims could be assured that any losses they may suffer following an accident would be covered in accordance with the coverage required by the state where the accident occurred.

Art 14 (originally Art 2 of the third MID) was intended to supplement Art 3 since it became clear that in some Member States insurers were covering third party losses in other Member States, but if the insured had not notified his insurer of his intended travel plans and paid an additional premium the insurer was free to claim the sums paid in compensation back from the driver.³⁶ Art 14 makes it clear that the policy should cover third party losses throughout the territory of the EU on the basis of a single premium.

In terms of the level of insurance coverage to be provided, these measures undoubtedly designate an applicable law, which will either be the law of the place of the accident or the law of the state of registration of the vehicle, whichever provides for the highest cover. What is more troubling, and less certain, is whether the term 'coverage' incorporates the calculation of damages to be paid or merely refers to the financial limit of the coverage.

Under the MID harmonisation of insurance cover relates to the minimum types and amount of damage which are recoverable, although Member States can enact more favourable rules should they so wish.³⁷ When viewed alongside the harmonisation measures, the rule in Art 14 could be seen as one which requires the type and amount of damages to be calculated under the law which provides for the highest cover out of the law of the place of the accident or the law of the place of registration of the vehicle. The rule in Art 14 would, therefore, designate as applicable the law which provided for the highest cover in this regard. Furthermore, the fourth MID displayed a much more overt intention to protect the victim of a traffic accident, particularly a visiting victim. The rules derived from this Directive seem to embody the view that victims are the weaker party, less able to absorb the cost and other inconvenience of having to litigate abroad.³⁸ Providing for the law with the highest cover to govern the assessment of damages would fit this scheme to create a much more coherent picture which would be congruent with the overriding aim of the objective which is to protect the interests of accident victims, regardless of where in the EU the accident occurs.

1.3. Different Choice of Law Outcomes and Their Reconciliation

Whether the rules of the MID relate to the upper limit of cover or to the type and quantification of damages there is a potential for conflict with the rules of Rome II.

1.3.1. The Possibility for Differing Choice of Law Outcomes

In determining the applicable law following a traffic accident, the general rule in Rome II points to the place of the damage (which will likely be the place of the accident). However, there is no way of knowing in advance if the parties will share the same residence so as to engage Art 4(2) of Rome II or whether there will be another factor creating a manifestly closer connection with another country so as to engage Art 4(3). Neither of these options is available under the Directive. Importantly, Art 18 of Rome II may also give the victim a choice of the law of the insurance contract, which will usually relate to the place where the vehicle is normally based, but this is optional for the victim. Under the Directives the application of this law is compulsory if that State provides a

³⁵ See Recitals 2-5 of Dir 72/166/EEC, the first MID.

³⁶ See the Commission proposal for the third MID, Com (88) 644 Final, OJ C16 20.1.1989 p5-7.

³⁷ Article 28.

³⁸ Supra n27 above.

higher level of cover than the State of the place of the accident. Furthermore, recital 33 may give rise to a particular approach to the calculation of damages under Rome II, which the courts will not pay attention to under the rules in the Directives. Therefore, the choice of law outcome is very much dependent upon the scheme which is being applied. The quantification of damages, or at the very least the amount of coverage to be provided by the insurer, will be affected depending on which regime is followed.

Digging beneath the rules themselves to look at the rationale for the schemes also reveals a great deal of variance. While Rome II is based on certainty and predictability of choice of law outcome, with importance attached to objectively ascertainable results and achieving a reasonable balance between the parties,³⁹ the Directive's focus is the removal of obstacles to the free movement of persons and vehicles and the comparable treatment of victims no matter where in the Community an accident may occur. The ECJ has been seen to refer to these objectives when deciding difficult issues.⁴⁰

With this in mind, is it possible to reconcile Rome II with the MID?

1.3.2. Reconciliation

The MID requires national implementing measures. If these conflict with subsequent EU legislation the subsequent measures must take precedence. This much is a basic principle of EU law and was made clear in the case of *Simmenthal*.⁴¹ However, with regard to the relationship between Rome II and the MID, there are two provisions of Rome II which require consideration: Art 16 and Art 27.

Article 16 states:

Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.

In order for a provision to be considered overriding and mandatory in nature it must be clear that it is a rule which cannot be derogated from and that the rule serves the public interest.⁴² This reasoning has been held to apply not only to national rules of the forum which are of a purely domestic nature but also to those rules which implement EU legislation into national law.⁴³ On their face, the rules contained in the Directives are mandatory in nature, Member States are required to implement them and the CJEU has been determined in enforcing their effect. Furthermore, they are almost certainly to be considered as serving the public interest. The ultimate aim of the Directives is greatly to reduce the obstacles to free movement of persons and vehicles within the Community by ensuring that accident victims receive comparable treatment regardless of where in the Community the accident occurs. This serves Community interests in furthering the internal market; it also serves national public interests by ensuring that all those who are resident in a state are guaranteed insurance coverage against losses incurred as a result of a traffic accident.

³⁹ These objectives were expressed by the Commission in its Proposal COM (2003) 427 FINAL at p 11-12 and are repeated in Recital 6 of Rome II.

⁴⁰ See for example *Candolin* n26 above at para 17; *Bernaldez* n24 above at para 13; *Ferreira* n25 above at para 24; *Commission v. Italy* n15 above at para 75; Case C-166/02 *Daniel Fernando Messejana Viegas v. Companhia de Seguros Zurich SA, Mitsubishi Motors de Portugal SA*, [2003] I-07871, para 22; Case C-447/04 *Autohaus Ostermann GmbH v VAV Versicherungs AG*, [2005] ECR I-10407, para 25.

⁴¹ Case C-106/77 [1978] ECR 629 paras 17-22.

⁴² As stated in Cases C-369/96 and C-376/06 *Arblade* [1999] ECR I-8453. See also recital 32 of Rome II.

⁴³ See Case C-381/98 *Ingmar Gb Ltd v Eaton Leonard Technologies Inc.* [2001] 1 C.M.L.R. 9.

There are three ways in which the MID's may have been received in a Member State. Firstly the minimum standards required by the Directives may not have been met. In this circumstance there is a basis for arguing that the law of the forum could treat its own rules, which do meet the minimum standards, as overriding the rules of the applicable law which do not, under Article 16. Secondly, the Member State may have achieved the minimum standard required by the MID's. Where the minimum standards of the MID's are met by both the applicable law and the law of the forum, it is submitted that no justification can be found for substituting one rule with another. To suggest that national implementing provisions must take precedence over the otherwise applicable law (of another EU Member State) where each State has achieved at least the minimum requirements and will therefore have met the aims and objectives of the MID's is not defensible. It should be remembered that for accidents occurring outside of EU Member State territories and involving vehicles not normally based in the territory of a Member State the MID's do not apply and either Rome II or the Hague Convention will be determinative of the applicable law.

There is a further scenario which must be considered, however. It is less clear what will happen in situations where the law of the forum has enacted provisions which surpass the requirements of the MID's to offer a more favourable outcome to the victim. As already stated, states are free to enact such measures under Art 28 of the 6th MID and Art 16 of Rome II leaves it open to the forum concerned to decide for itself which rules cannot be derogated from and are in its public interest. It is, therefore, possible that national courts may invoke Art 16 to override the otherwise applicable law and apply its mandatory rules which are more favourable to the victim. The occurrence of this situation cannot easily be predicted. All that can be said is that in reconciling the conflict between the MID's and Rome II Article 16 may apply, sometimes. As such attention must turn to whether Article 27 can provide any further answers.

Article 27

Article 27 of Rome II provides that the Regulation:

... shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations.

Art 27 is to be read in conjunction with Recital 35 which provides that the Regulation should not prejudice the application of instruments laying down provisions designed to contribute to the proper functioning of the internal market *'in so far as they cannot be applied in conjunction with the law designated by the rules of this Regulation'*. The MID's were designed to ensure harmonisation of Member State rules on third party liability insurance with a view to providing a level playing field for insurance providers and minimum standards of protection for victims of traffic accidents. Recital 2 of the MID indeed states that motor insurance is an important part of the non-life insurance business in the Community and that it has an impact on the free movement of people and vehicles; making consolidation of the internal market in motor insurance a key objective of Community action. It is arguable therefore that, to the extent that the law specified by the Regulation, as applying to the payment of compensation or provision of insurance coverage by an insurer, provides for a lower level of cover than the law applicable under the MID, the law specified by the MID should prevail in accordance with Article 27. The fact that the Directives require implementation in Member States through national measures which would normally be subordinate to Community law in the form of a Regulation should not be a bar to the operation of Art 27.

The conclusion is that the applicable law will be as designated under the Regulation unless the law designated by the MID provides a higher standard of insurance coverage or for a higher calculation of damages (depending on the accepted meaning of Art 14 of the MID). Here a claimant could, through Art 27, invoke Art 2 of the third MID to take advantage of that higher provision.

2. ROME II AND THE HAGUE CONVENTION

2.1. The Rules of the Hague Convention

2.1.1. The Convention Choice of Law Rules

The policy of the choice of law rules in the Convention is quite different to that under Rome II. The Convention contains a basic rule in Article 3, which designates as applicable the law of the place of the accident. It can be noted that the basic rule will, by and large, produce the same result as Art 4(1) of Rome II since, as already stated, the place where the damage arises is likely to be the place of the accident in a cross border traffic accident. This rule is then subject to a cascading system of rigid exceptions.

The exceptions to the basic rule are contained in Articles 4, 5 and 6 of the Convention. Article 4 provides that in claims made by the driver, owner or other person having control of the vehicle; claims made by passenger victims who are habitually resident in a country other than that where the accident occurred; and claims made by persons outside of the vehicle who are habitually resident in the country of registration of the vehicle; the law of the state of registration shall apply.⁴⁴ This is so in all accidents involving one vehicle⁴⁵ (where a vehicle collides with a tree for example) and in accidents involving two or more vehicles if all the vehicles concerned are registered in the same state.⁴⁶ If those vehicles are registered in different states then the general rule in Art 3 will be applicable. Under Article 5 the law designated by either Art 3 or 4 in respect of claims made by a passenger will also govern any claims for damage to property being carried in the vehicle belonging to that passenger. Claims for any other goods being carried in the vehicle will be governed by the law designated by Art 3 or 4 in respect of claims by the owner. Claims for damage to goods outside of the vehicle will be governed by the internal law of the state of the accident unless the claim relates to the personal belongings of a victim outside the vehicle where the applicable law under Art 4 would be the law of registration. Here the law of registration will also apply to the claim for property damage.

Both the general rule and the exceptions are based on the need to apply a law which will, in the majority of cases, accord with the expectations of the parties and be the law of the place where the majority of connecting factors converge.⁴⁷ For example in a one vehicle accident brought by an owner against a driver for property damage, the law of the place of registration of the vehicle will likely accord with: the habitual residence of the owner, the place of establishment of the insurer, the place where the insurance contract was concluded, the law which governs the insurance contract and possibly the habitual residence of the driver.

Article 6 mitigates the possibility of unclear or inappropriate applicable law outcomes, to some extent. It provides that where there is no registration, or where there is multiple registration, it is the law of the place where the vehicle is habitually stationed which will apply in place of the law of the place of registration. Article 6 provides further that this same law will apply to those situations identified in Arts 4 and 5, but where the owner, driver or person having control of the vehicle is not habitually resident in the state of registration of the vehicle. This aims to retain the position of the applicable law as the law which corresponds to the majority of connecting factors in cases where there is very little to connect a claim to the law of the place of registration.

⁴⁴ Article 4(a).

⁴⁵ Ibid.

⁴⁶ Article 4(b)

⁴⁷ See E. Essen, *Explanatory Report on the Convention on the Law Applicable to Traffic Accidents* (1970) available at <http://www.hcch.net/upload/expl19e.pdf>, p3 and 15.

Of overriding importance in the construction of rules for the Convention was the notion that, bearing in mind that most accidents are resolved outside of the litigation process,⁴⁸ those rules should be easy and straightforward to apply.⁴⁹ For this reason a flexible exception based on ideas of discovering the 'proper' law of the tort, or on producing a fair outcome between the parties in every case, was not accepted.⁵⁰ The exceptions are rigid and it is conceivable, therefore, that they may produce odd outcomes where the designated law does not appear to be the law most closely connected to the particular circumstances.⁵¹ It can also be noted that in trying to ensure that the resolution of claims can be achieved quickly and easily it is the law which corresponds to the law under which the insurer operates which is designated by the exceptions. This was acknowledged as being more favourable to the insurer who can process the claim in accordance with familiar laws, the consequent effect being that claims could be settled more expeditiously.⁵² This approach is in contrast to that of Rome II where the aim is to find a solution which balances the interests of the parties. It also contrasts with the MID which seeks to favour and protect the victim as discussed above.

Having said this Article 9 of the Convention provides that the victim may bring a direct action against an insurer if any one of the following laws so permits: the applicable law under Article 3, 4 or 5, the law of the state of registration or the law applicable to the insurance contract. This provision does protect, as far as is sensibly possible, a victim's right to a direct action.

It should be noted that the Convention does not provide for the parties to a claim to choose the law which will apply in the settlement of that claim, either *ex post* or *ex ante*.

Of the remaining provisions of the Convention, those which have a bearing on the subject of this note are Article 1, 2 and 8. Article 1 provides:

The present Convention shall determine the law applicable to civil non-contractual liability arising from traffic accidents, in whatever kind of proceeding it is sought to enforce this liability.

This provision defines the scope of the Convention and in this regard it is very similar to Art 1 of Rome II. Both provisions determine that the respective instruments shall apply to determine applicable law for non- contractual liability in civil matters. In respect of traffic accidents, the provisions have potentially very similar, if not identical, effect. However, an issue which arises in respect of the relationship between Rome II and the Hague Convention is that of the interpretation to be given to the term '*non-contractual*'. Under the Convention each signatory state would use its own rules to determine whether an issue related to civil liability and also whether it was non contractual in nature.⁵³ Under Rome II the phrases have to be given an autonomous definition which is to apply throughout the Union irrespective of national characterisation or definition.⁵⁴ With this in mind a question arises as to how interpretation under the Convention is to be approached in light of the need for autonomous definitions under Rome II. The answer is dependent upon defining the exact relationship between the two instruments.⁵⁵

⁴⁸ See in relation to the English system, R. Lewis 'Insurance and the Tort System' 25 LS (2005) 85 at 88. Also see the General Report of Mr. E.W. Essen, in Conference de La Haye de Droit International Prive, "*Actes et Documents de la XIN Session*," 1970, t.III, 200 at 206 in respect of evidence presented by the Swiss delegation to the eleventh session of the Hague Conference which showed that out of 1000 traffic accident cases insurers settled 995 out of court.

⁴⁹ Supra n47 above.

⁵⁰ Ibid.

⁵¹ See examples given by C. Armstrong '*The Hague Convention on the Law Applicable to Traffic Accidents: search for Uniformity Amidst Doctrinal Diversity*' (1972) Columbia Journal of Transnational Law 74, at 81.

⁵² See Report Of United States Delegation To Eleventh Session Of Hague Conference On Private International Law [April 1969] 8 International Legal Materials (1969)785 at 802.

⁵³ See the Explanatory Report Footnote 47 above at p7.

⁵⁴ See the Commission Proposal for Rome II footnote 10 above at p8.

⁵⁵ See below section 2.2.

Article 2 of the Convention contains a list of exclusions, things to which the Convention will not apply. It is worth highlighting a number of these. Firstly, the Convention does not apply to actions relating to product liability since there is a separate Hague Convention dealing with this issue. This Convention will also take effect under Art 28 of Rome II. Secondly, the Convention does not apply to vicarious liability other than the liability of an owner, of a principal or of a master. This provision was, in the main, designed to exclude issues relating to the vicarious liability between family members from the scope of the Convention.⁵⁶ It can be noted that there are no exclusions in Rome II to this effect. Thirdly, the Convention will not apply to actions or recourse actions by or against social insurance institutions or automobile guarantee funds. Again no such exclusions are to be found under Rome II.

Article 8 of the Convention provides for those matters which the applicable law will apply to and is very similar in scope to Article 15 of Rome II.

2.2. Article 28 Rome II: The Relationship between Rome II and the Hague Convention.

Article 28 of Rome II provides:

This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations.

There is no doubt that this provision applies to allow those Member States who are signatories to the Convention to continue to apply it. The Commission in its original proposal for Rome II made specific mention of the Hague Convention for choice of law in traffic accidents in relation to this provision⁵⁷ and Art 30 of Rome II calls for a study into the effect of Art 28 in respect of the Convention. What is less clear is what the exact contours of the relationship between Rome II and the Hague Convention are.

That Rome II and the Hague Convention will produce different choice of law outcomes is clear if an example is considered. Where two German citizens hire a car in Spain and the driver crashes into a tree, a German court applying Rome II would apply German law as the law of shared habitual residence, whilst a Spanish court, applying the Hague Convention, would apply Spanish law as the law of the place of registration of the vehicle. As such deciphering the relationship between the two instruments is important.

Some initial observations can be made at this point. Firstly, it has been acknowledged that the CJEU has no jurisdiction to rule on the interpretation of international agreements and moreover that where the EU is a party to those agreements it will be bound by the provisions contained in it which will have direct effect within the Union.⁵⁸ Where the EU is not a party to an agreement itself it may still be bound by its terms if all the Member States are party to it and it can be found that the EU has succeeded to those obligations.⁵⁹ However, where the EU is not bound by an international agreement, the CJEU has ruled that the EU is an autonomous legal system, the rules of which cannot be prejudiced by an international agreement.⁶⁰ It is clear that the EU is not bound by the Hague Convention to which it is not a party and to which not all of the Member States are signatories.

⁵⁶ See the Explanatory Report Footnote 47 above at p11.

⁵⁷ See the Commission Proposal for Rome II, Com (2003) 427 FINAL, 29.

⁵⁸ See Case C-366/10 *American Airlines Inc. And others v Secretary of State for Energy and Climate Change*, ECR [2011] page 00000 at para 49 – 50.

⁵⁹ Joined Cases 21/72 to 24/72 *International Fruit Company and Others* [1972] ECR 1219, para 18.

⁶⁰ See Joined cases C- 402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* ECR 2008 page I-06351, para 316; also see the Airlines Case footnote 58 above at paras 61 -71.

Secondly, under Art 351(2) TFEU EU Member States are to take all appropriate steps to remove incompatibilities between an international agreement and the EU Treaties. This has been held to apply to legislation of the EU institutions and not only to the effect of the Treaties themselves.⁶¹ On this basis it is arguable that, absent Art 28 of Rome II, the Hague Convention would not be applicable in the EU Member States which are signatories to it, from the date on which the Regulation entered into force.

In respect of the relationship between the Convention and the Regulation, bearing in mind Art 28, guidance might be found in decisions of the CJEU in relation to the Brussels Convention⁶² and the Brussels I Regulation.⁶³ In the case of *Tatry*⁶⁴ the CJEU had been asked to interpret Art 57 of the Brussels Convention, which is a provision very similar in effect to Art 28 of Rome II. The court ruled that where a specialist Convention contains certain rules of jurisdiction but not other rules equivalent to those contained in the Brussels Convention, the rules of the Convention will apply to fill in the gaps, so to speak.

In the *TNT* case⁶⁵ the CJEU was asked to interpret the relationship between Brussels I and the Convention on the Contract for the International Carriage of Goods by Road. Article 71 of Brussels I is the equivalent provision of Art 57 of the Brussels Convention, it provides that:

1. This Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.

A question arose as to the interpretation of Art 71 and in particular whether the rules of the Regulation should always yield to those of the specialist Convention or whether this should only be the case in circumstances where that Convention claims exclusivity of application. A further question which fell to be decided was whether, in the event of concurrence of certain rules of that Convention with rules of the Regulation, the rules of the specialist Convention should, under Art 71 of Brussels I, take precedence. The CJEU ruled that in principle where a dispute fell within the scope of the specialist Convention that Convention should apply but that the rules of the Convention cannot compromise the underlying principles of the Regulation.⁶⁶

By analogy these decisions have the potential to give some meaning to the relationship between Rome II and the Hague Convention. The decisions suggest that specialist Conventions apply because the Regulation concerned directs that they should, not because they are owed a higher status in law. Accordingly, the Hague Convention on the law applicable to Cross Border Traffic Accidents will be applied in the courts of those states which are signatories of that Convention because Art 28 permits this.

Furthermore, the decisions indicate that the aims and objectives of Rome II will be important in the decision about whether the Convention will be applied. If the rules of the Convention contradict or undermine the objectives of certainty, uniformity and predictability of outcome and of balancing the interests of the parties, which are important in securing the free movement of persons throughout the Union,⁶⁷ then their application may be curtailed. Whilst in the main the choice of law rules of the Convention are unlikely to challenge the aims of Rome II, the scope of the Convention as expressed in Art 1 could be problematic.

⁶¹ Case C-84/98 *Commission v Portugal* [2000] ECR I-5215.

⁶² Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

⁶³ Council Regulation (EC) No [44/2001](#) of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁶⁴ Case C-406/92 *The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj"* ECR [1994] I-05439.

⁶⁵ Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG* ECR [2010] 00000.

⁶⁶ *Ibid* at para 45.

⁶⁷ See in particular Recitals 6 and 16 of Rome II.

The Hague Convention is interpreted by the courts of each signatory state in accordance with the framework of that state's national law. Accordingly whether a dispute falls within the term '*non-contractual*' will depend on the way in which each court characterises a particular issue. It has been noted that this could mean, for example, that when a passenger in a taxi is injured during an accident, where the driver is at fault, any subsequent claim might be characterised as non-contractual in some states, but as contractual in others.⁶⁸ By contrast Rome II requires that the term '*non-contractual obligation*' in its Art 1 will be given an autonomous definition throughout the EU and that the definition will be mutually exclusive with the definition of '*contractual obligation*' for the Rome I Regulation on the law applicable to contractual obligations.⁶⁹ There should be no overlap between the two instruments. Uniform characterisation is important in achieving uniformity of outcome in general which is in turn important for securing the proper functioning of the internal market. If countries maintain a separate and different characterisation of a non-contractual obligation under the Hague Convention than under Rome II this aim would be put in jeopardy. The CJEU decisions on the Brussels regime as discussed above could suggest that since the underlying aims and objectives of both the Regulation and of EU law in general should be taken into account in the application of any specialist Conventions, that the interpretation of '*non-contractual*' for the purposes of the Hague Convention should, in EU Member States accord with the definition of that term for the purposes of the Rome II Regulation.

There is a live debate as to whether the Hague Convention excludes choice of law agreements between the parties altogether.⁷⁰ One reading of the Brussels I jurisprudence would suggest that since the Convention contains no express rules on the matter the Regulation can step in to fill that gap, it providing that certain agreements are valid. On this reasoning it would also seem to be the case that any disputes falling outside the scope of the Convention but within the scope of the Regulation (cases relating to the vicarious liability of a parent for example) would be dealt with by the Regulation even if brought in the courts of a state which is a signatory to the Convention. The same might also be said of Art 16 of Rome II which provides for the application of overriding mandatory rules of the forum, such as those rules contained in the MID as discussed above. It could also be said of Art 27 of Rome II on the application of choice of law rules in other EU instruments. However, it could conversely be argued that the exclusion from the Convention of rules on these matters was deliberate and that as such these exclusions form a part of the choice of law scheme as much as the rules in the Articles do. For example it may be the intention of the Convention not to allow forum rules to override the applicable law. To view the situation as one where any provision of the Regulation which does not have a corresponding provision in the Convention must automatically apply it too simplistic. Nevertheless, the task of determining what the Convention intended to exclude will not be easy and a certain amount of uncertainty persists here.

⁶⁸ See the examples given by Armstrong footnote 51 above at p 76-77.

⁶⁹ See Recital 7 of Rome II and Recital 7 of Regulation (EC) No 593/2008 Of The European Parliament And Of The Council on the law applicable to contractual obligations, hereinafter referred to as Rome I.

⁷⁰ See T Kadner Graziano 'The Rome II Regulation and the Hague Conventions on Traffic Accidents and Product Liability – Interaction Conflicts and Future Perspectives' (2008) NiPR 425 at 426.

3. The Hague Convention and the MID

It is notable that the choice of law outcomes of the MID and the Hague Convention, as regards the payment of damages by an insurer, are very similar. Both point to either the law of the place of the accident or the law of the place of registration of the vehicle. The difference being that under the MID the choice is made on the basis of which law provides for the highest cover, whereas the Convention determines this on the basis of the country where most of the connecting factors converge, in accordance with its rules of exception. Additionally, the MID seeks to make it as easy as possible for the victim to seek compensation in a practical sense, whereas the main purpose of the Convention is to provide clear, easy to apply rules which result in predictable outcomes. Again, the question arises, if these two instruments should conflict which should take precedence?

The Convention provides in Art 15 that it shall not prevail over other Conventions which contain provisions relating to non-contractual liability arising out of traffic accidents to which the contracting states may become party. It is unclear whether this can provide any answers for the relationship between the Convention and the MID since the MID cannot be considered to be an International Convention. The MID is the product of a supranational entity and as a Directive it requires national implementing provisions in order to take effect in the EU Member States. It is rather those national provisions which will in fact have the potential to come into conflict with the Convention, making it all the more unlikely that the provisions of the MID could be classified as stemming from an instrument of international law.

Since, as discussed above, it is possible that Art 16 and 27 of Rome II might apply in spite of the Convention, because no equivalent provisions are contained in it, these provisions could permit the MID to take precedence over the Convention. Nevertheless, as mentioned above, that this is the case is far from clear. However the answer is in fact much more straightforward.

It is submitted that, as stated above, since the EU itself is not a party to the Hague Convention and since uniform application of EU rules in all Member States is important in ensuring the underlying objectives of the Union, it can be argued that it would be untenable to allow nearly half of the Member States to consider the rules of the MID to be subordinate to those rules of an International Convention, which is only applicable because an EU Regulation directs that it is, whilst the remaining Member States under Art 27 of Rome II may have to apply the rules of the MID to the issue of quantification of damages or amount of insurance coverage. The resulting uneven application of an EU Directive, designed to have equal effect throughout the Union, would be opposed to the fundamental principle that EU law should be applied uniformly by all the Member States.⁷¹

As such it is in fact irrelevant whether Art 27 of Rome II can take effect alongside the Hague Convention because, as a matter of EU law the Directive should be applied equally throughout the entire territory of the EU. It is submitted that the rules of the Hague Convention will apply to issues of liability and the rule contained in the MID will apply to the quantification of damages to be paid by an insurer or to the amount of coverage to be provided, depending on the interpretation of the choice of law rule in the MID.

⁷¹ That this is a fundamental requirement is clear from Art 17 TEU which gives the Commission powers to ensure the uniform application of EU law, furthermore, Art 267 TFEU is viewed by the CJEU as conferring jurisdiction on the CJEU for the purpose of ensuring the uniform application of Union law. See Case C-366/10, footnote 58 above at para 47.

4. Possible Amendment

It should now be clear that the law relating to choice of law for cross border traffic accident cases is both complex and confusing. The application of different instruments which are guided by differing aims and objectives and which produce varying choice of law outcomes is the antithesis of what is required in an area of law where the majority of claims between an insurer and a third party victim are settled outside of the litigation process.⁷² This area of the law would benefit immensely from amendment to make the relevant rules clear and coherent.

There has already been much talk of reform in relation to this subject.⁷³ A number of options have been put forward for the remedy of the current situation. Harmonisation of substantive laws relating to damages and limitation periods would resolve the current issues surrounding applicable law. However, whilst there might be a remote possibility of agreement regarding limitation periods in the not too distant future,⁷⁴ it is submitted that harmonisation of the law relating to damages is an unrealistic goal in the short to medium term. Agreement here is likely to remain elusive for the foreseeable future. Furthermore, the provision of information to victims about applicable foreign limitation periods would not address the complexity of the choice of law rules in this area and would be unlikely, in the author's opinion, to have enough impact to remedy the current prejudice faced by victims.

In respect of claims between a victim and a wrongdoer, the author's view is that rules which attempt to balance the interests of both parties are preferable and that the co-existence of two regimes results in unnecessary complexity. For these reasons the sole application of Rome II would be an improvement on the current situation.

With regard to direct actions against insurers, the current system, where victims can bring claims in their home states, but where the applicable law is highly unlikely to be the law of that state, means that courts are faced with the complex task of nearly always having to apply a foreign law to the claim. Insurers can be deemed to be in a position of power in such circumstances. Their knowledge of the system, financial resources and access to information about the law is far superior that of the average victim. This is particularly so since insurers, by virtue of the MID are already exposed to the laws in each Member State and must have appointed a claims representative to deal with claims brought in those countries. The victim on the other hand is likely to be a one time claimant, struggling to cope with the effects of the injuries or other losses suffered.

Whilst it is difficult to justify tipping the choice of law balance in favour of the victim in a claim between the victim and the tortfeasor, because here the parties are on an equal footing, this is not so in an action between a victim and an insurer where the victim can be viewed as a weaker party. The framework of victim protection measures contained in the MID makes it possible to ring fence direct actions against insurers in cases to which the MIDs are applicable. Here the victim can already bring an action in the courts of their home state. If the applicable law were also the law of that state, the victim would be permitted to proceed under a familiar system of law and receive a level of damages

⁷² See footnote 48 above.

⁷³ A large part of the Commission report into improving the position of victims of cross border accidents (footnote 6 above) was spent discussing possible options for reform. The Commission has since launched two public consultations on the subject. Information on the first consultation along with all the contributions received is available at: http://ec.europa.eu/internal_market/consultations/2009/cross-border-accidents_en.htm. Details of the second consultation can be found at: http://ec.europa.eu/justice/newsroom/civil/opinion/121031_en.htm.

⁷⁴ See for example the *Proposal for a Regulation Of The European Parliament And The Council On Limitation Periods For Compensation Claims Of Victims Of Cross-Border Road Traffic Accidents In The European Union* drawn up by the Pan European Organisation of Personal Injury Lawyers (PEOPIL) in this regard. Available at <http://www.peopil.com/peopil/userfiles/file/Annex%201%20PEOPIL%20Proposal%20compClaimRTAxborder%20Oct12.pdf>.

which accords with the social and economic conditions prevalent in that country.⁷⁵ The potential for over or under compensation of cross border traffic accident victims was confirmed in a report prepared on behalf of the European Commission,⁷⁶ as has the difficulty of applying unfamiliar limitation or prescription periods.⁷⁷ Application of the victim's home law would not automatically mean more compensation or more favourable limitation periods, but would mean the application of rules which match social context.

It is recognised that this is a fairly bold recommendation to make. It will no doubt be controversial. Chief amongst the objections to it will be that it would result, in respect of liability, to the application of a law under which the driver was not operating at the time of the accident. Such an approach is counter intuitive, however, there are no perfect solutions to the current problems in this area and it should be remembered that this proposal will not affect claims brought against the driver directly. The application of the victim's home law to quantification of damages alone risks the perpetuation of any prejudice faced by victims. Rules relating to damages do not exist in a vacuum, they will interrelate with the type of liability imposed (strict or fault based for example) and with the social security provisions of any given state. These provisions collectively reflect deep rooted social values.⁷⁸ Divorcing rules on quantum would therefore be artificial and may not improve the position for a victim. For example, if strict liability is imposed in a particular state, but this corresponds to a shorter limitation period and/or lower levels of damages, a victim who must prove liability under a law requiring proof of fault but who will receive the lower levels of damages will still face a certain amount of disadvantage.

Application of the law of the victim's state of habitual residence to the whole claim, would, conversely, provide a coherent approach which would put the victim into the position he would have been in had the accident been a purely domestic one. Furthermore, a number of factors would mitigate the potential impact on insurance companies of a change in the law to this effect. Firstly, evidence suggests that in the majority of claims dealt with by insurance companies, liability is not contested.⁷⁹ Secondly, evidence suggests that the majority of claims arising out of traffic accidents are low in value.⁸⁰ Thirdly, it would seem that the numbers of traffic accidents of a cross border nature represent a small percentage of all traffic accidents.⁸¹ These factors together mean that a change in choice of law rules for direct actions would be unlikely to have a major impact on the way insurers conduct their business, while it would eradicate the possibility of prejudice to victims, particularly those who suffer large losses or catastrophic injury.

One potential problem remains in relation to the possibility of a victim concurrently bringing actions against both the insurer and the wrongdoer. Here difficulties could arise from the assessment of the wrongful conduct under different laws in each of those claims. For this reason it would be advisable to give the victim a choice of bringing the action directly against the insurer in their home courts and under their home law or bringing an action against the driver (even though the insurer may eventually be the party to pay the compensation) in the courts having jurisdiction to hear the claim and under the law designated by the relevant choice of law instrument. Bringing the claim against one defendant should therefore prohibit bringing the claim against a different defendant in this regard.

⁷⁵ PEOPIL have previously made a similar recommendation with regard to the separate treatment of direct actions for choice of law purposes but suggested that the victim's home law should apply to issues of quantum only. See *PEOPIL Response To The European Commission Consultation Paper On The Compensation Of Victims Of Cross-Border Road Traffic Accidents In The European Union* May 2009, available at http://www.peopil.com/peopil/userfiles/file/PEOPIL_RESPONSE__ROME_II_rta_consultation_0509.pdf

⁷⁶ See Commission report, footnote 6 above at p43-44.

⁷⁷ Ibid at p22-23.

⁷⁸ See, U Magnus (ed) *The Impact of Social Security Law on Tort Law*, (Vol 3, Tort and Insurance Law, Springer, 2003).

⁷⁹ See Lewis, footnote 48 above, p87 for statistics relating to the English position.

⁸⁰ See the Commission Report, footnote 6 above at p54.

⁸¹ Ibid at p52. Also see footnote 1 above.

Finally, whichever approach is adopted to amend the current situation should be contained in one instrument which provides the one and only, clear set of choice of law rules. This would preferably take the form of an amendment to Rome II which would be directly applicable in all EU Member States.

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C** CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

Role

Policy departments are research units that provide specialised advice to committees, inter-parliamentary delegations and other parliamentary bodies.

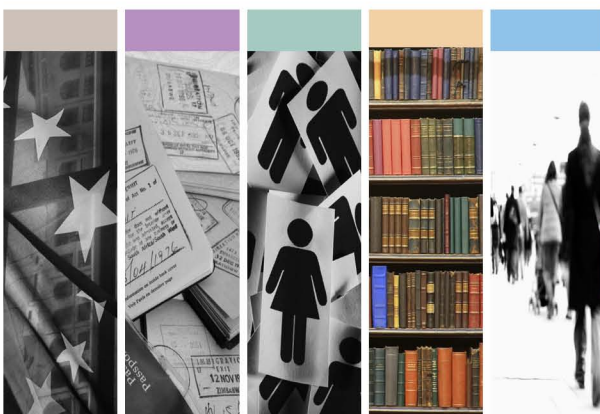
Policy Areas

- Constitutional Affairs
- Justice, Freedom and Security
- Gender Equality
- Legal and Parliamentary Affairs
- Petitions

Documents

Visit the European Parliament website: <http://www.europarl.europa.eu>

PHOTO CREDIT: iStock International Inc.



ISBN